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Supreme Court of the United States

OCTOBER TERM, 1946.

No. 771.

EDWARD VANCE, APPELLANT,

VS.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS ET AL., APPELLEES.

BRIEF OF MUSIC PUBLISHER'S PROTECTIVE ASSOCIATION IN OPPOSITION TO THE ISSUANCE OF WRIT OF CERTIORARI.

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The Petition for Writ of Certiorari repeats the confusion in pleadings that has constantly existed in this cause. Edward Vance filed a complaint in the District Court of the United States for the Western District of Missouri which petition was attacked by Motion to Dismiss for the reason, among others, that it did not comply with Rule 8 of the Federal Rules of Civil Procedure. The District Court sustained the motion on that ground. Alleged

amended pleadings were filed; similar motions were filed attacking these pleadings not only for the failure to comply with Rule 8 but because they failed to show that the Court had jurisdiction of the cause of action attempted to be stated, and because the pleadings did not state a claim against any of the defendants upon which relief could be granted. These motions were sustained on all three grounds. The Plaintiff below then filed "Motion for Review of the Complaint and to Vacate Court Order" which was overruled. Application for direct appeal to this Court was denied. This Petition for Writ of Certiorari to the District Court of the United States for the Western District of Missouri was filed. Also Plaintiff filed notice of appeal to the Circuit Court of Appeals for the Eighth Circuit, which notice has since been withdrawn.

It is hard to determine what the pleader is intending to say. It is apparent one thing complained of is the lower court's holding (1) that the Plaintiff must have a certain theory to effect suit under the Anti-Trust Laws, (2) that the Plaintiff must state a cause of action, and (3) that the pleadings are for the purpose of framing issues and preparing the controversy for trial.

Section 238 of the Judicial Code (U. S. C. A., Title 28, Sec. 345) is as follows:

> "345. (Judicial Code, Section 238.) Appellate Jurisdiction from Decrees of United States District Courts. A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following sections or parts of sections and not otherwise:
>
> (1) Section 29 of Title 15, and Section 45 of Title 49.
>
> (2) Section 682 of Title 18, where the decision of the district court is adverse to the United States.

(3) Section 380 of this title.

(4) So much of Sections 47 and 47a of this title as relates to the review of interlocutory and final judgments and decrees in suits to enforce, suspend, or set aside orders of the Interstate Commerce Commission other than for the payment of money.

(5) Section 217 of Title 7."

In the case of *United States* v. *Belt*, 1943, 63 S. Ct. 1278, 319 U. S. 521, 87 L. Ed. 1559, it was stated "the dominating policy of the 1925 Amendment to this Section was to restrict direct review to the Supreme Court as a matter of right, and more particularly to shut off such direct review of judgments of Federal *nisi prius* Courts." This was a case in which the United States was seeking to appeal directly from the Supreme Court of the District of Columbia to the Supreme Court of the United States, under authority of Section 5 of the Act of April 27, 1912 (37 Stat. 93, Ch. 96), authorizing suits for the purpose of clearing title to certain lands of the United States in the District of Columbia. The Supreme Court held that the section mentioned above was impliedly repealed by the provisions of the Act of February 13, 1925 (43 Stat. 936, 28 U. S. C., Sec. 345), permitting direct review by the Supreme Court of the judgments of Federal District Courts in only five specified categories "and not otherwise," although the Supreme Court of the District of Columbia did not become a District Court in name until the Act of June 25, 1936 (49 Stat. 1921, Ch. 804).

The Appellant's cause of action certainly does not fall in any of the five categories mentioned in this section.

The Appellant seems to rely on Title 28, Sec. 380a, U. S. C. A., but this section is clearly confined to cases in which the constitutionality of a Federal Statute is in

question. Nowhere in Appellant's Brief is there any complaint about the unconstitutionality of Section 8 of the Federal Rules of Procedure because of which his Petition was dismissed. Section 380a is confined to cases in which an injunction is sought to stop the application of a Federal Statute which the Plaintiff claims is unconstitutional. Since this remedy is a very powerful one, the Judicial Code very carefully provides that:

> "No interlocutory or permanent injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any Act of Congress upon the ground that such Act or any part thereof is repugnant to the Constitution of the United States shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge * * *"

The present cause of action does not even remotely resemble the cases provided for in this section. As clearly as can be determined, the present suit is one for damages for conspiracy. When Appellant in three tries failed to state a cause of action under Section 8 of the Federal Rules of Procedure his case was dismissed and now he seeks to enjoin the application of the statute under which his cause of action was dismissed. Every litigant would like to enjoin the rules under which his cause of action is defeated, but this is obviously impossible.

There can be no Writ of Certiorari from the Supreme Court of the United States to the District Court of the United States for the Western District of Missouri in this cause as *Section 237 of the Judicial Code*, as amended by the Acts of January 31, 1928, Ch. 14, Sec. 1, 45 Stat. 54,

U. S. C. A., Title 28, Sec. 344, does not authorize the issuance of Writ of Certiorari in this character of case.

Since there is no authority under which the Writ of Certiorari can be issued there is no need to discuss any of the specific errors urged other than to say that a mere reading of the pleadings will show the accuracy of the ruling of the District Court.

Wherefore, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

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